83-2137

No. 84-____



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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CHEMICAL REALTY CORPORATION,

*Petitioner,*

v.

HOME FEDERAL SAVINGS AND LOAN, ASSOCIATION OF HOLLYWOOD,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

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SYDNOR THOMPSON*
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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

## QUESTION PRESENTED

Whether the North Carolina Court of Appeals deprived the Petitioner of its right to an opportunity to be heard, as guaranteed by the due process clause of the fourteenth amendment of the United States Constitution, when it remanded Petitioner's action to the trial court for further proceedings on the existing record instead of ordering a new trial.

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## OPINIONS BELOW

The North Carolina Supreme Court's Order Denying Petitioner's Petition for Discretionary Review is reported without opinion at 310 N.C. 624, ___ S.E.2d _____ (1984). A copy of said Order of the North Carolina Supreme Court is attached hereto. (See Appendix 63.)

The Opinion of the North Carolina Court of Appeals on which this Petition is based is reported at 65 N.C. App. 242, 310 S.E.2d 33 (1983). A copy of said Opinion of the North Carolina Court of Appeals is attached hereto. (See Appendix 34.)

## JURISDICTIONAL GROUNDS

The date and time of entry of the judgment of the North Carolina Court of Appeals sought to be reviewed is December 6, 1983. A Petition for Rehearing was

denied February 7, 1984. A Petition for Discretionary Review by the Supreme Court of North Carolina was denied April 3, 1984.[1] This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. §1257(3)..

Petitioner prays that a writ of certiorari issue to review the judgment below upon the ground that the decision of the North Carolina Court of Appeals remanding the case to the trial court without ordering a new trial conflicts with the law of the State of North Carolina as set forth in Farmers Bank v. Michael T. Brown Distributors, Inc., 307

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[1] The denial by the North Carolina Supreme Court of Petitioner's petition for discretionary review thus resulted in the full effectiveness and finality of the North Carolina Court of Appeals' decision, no further review thereof being possible in the North Carolina courts.

N.C. 342, 298 S.E.2d 357 (1983), and has thereby deprived Petitioner of its right to an opportunity for a full hearing, as guaranteed by the due process clause of the fourteenth amendment of the United States Constitution.

## STATUTES INVOLVED

28 U.S.C. §1257 provides, in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari,.....where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

United States Constitution, Amendment XIV provides, in pertinent part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

On December 20, 1976, Chemical Realty Corporation[2] (hereinafter "Chemical") instituted this action against Home Federal Savings & Loan Association of Hollywood (hereinafter "Home Federal") in Buncombe County Superior Court, North Carolina, and

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[2] On July 28, 1983, Chemical Realty Corporation filed with the Department of State of New York a Certificate of Amendment of its Certificate of Incorporation which charged the name of the corporation to Chemical Real Holdings, Inc.

sought to recover $5,694,951.56 in money damages for, inter alia, Home Federal's breach of a take-out agreement in connection with a permanent loan commitment for the Landmark Hotel (now Inn on the Plaza, but hereinafter "Landmark") in Asheville, North Carolina. Home Federal moved to dismiss the action for, inter alia, lack of personal jurisdiction, and the trial court denied the motion. Thereafter, Home Federal appealed that decision to the North Carolina Court of Appeals, which unanimously affirmed the trial court's order. Home Federal then raised the jurisdictional question before both the Supreme Court of North Carolina and the United States Supreme Court, and both courts dismissed the appeals.

Judgment of the Trial Court

The case was tried before The Honorable C. Walter Allen, sitting without a jury, in Buncombe County Superior Court from September 22, 1980 through and including October 9, 1980. Closing arguments in the case were deferred pending the preparation of the trial transcript by the court reporter. Pursuant to Judge Allen's instructions, both parties filed proposed findings of fact, conclusions of law and judgments in November, 1981. Judge Allen heard closing arguments in the case on November 23, 1981.

Pursuant to Rule 52 of the North Carolina Rules of Civil Procedure, Judge Allen made certain findings of fact and conclusions of law and entered judgment for Home Federal on June 29, 1982.

In the complaint, Chemical had alleged that Home Federal had agreed to a "take-out" or purchase of Chemical's construction loan to Landmark and also alleged that it had made the construction loan to Landmark in reliance on Home Federal's promise to provide the long-term financing for the hotel.

Chemical alleged that Home Federal had a contractual duty to fund the long-term loan because (1) Chemical was the third-party beneficiary of the permanent loan commitment which Home Federal had issued to Landmark and (2) Home Federal had signed and sent a letter to Chemical in which Home Federal agreed to purchase the construction loan note and to accept an assignment of the deed of trust held by Chemical, thus creating

a direct contract between Chemical and Home Federal.

In its answer, Home Federal denied that Chemical was the third-party beneficiary of the permanent loan commitment and denied that its letter to Chemical constituted the basis for a contract.

In the findings of fact and conclusions of law contained in the trial court's Judgment, the trial court failed to make any finding or conclusion on the third-party beneficiary issue or on the contract issue. On July 7, 1982, Chemical gave notice of appeal to the North Carolina Court of Appeals, contending that the trial court erred in failing to make findings of fact and conclusions of law on these central issues and citing certain other errors

of the trial court. On December 3, 1982, the record on appeal in the case was docketed with the North Carolina Court of Appeals.

Decision of the North Carolina Court of Appeals

On December 6, 1983, the court of appeals filed its decision in this matter, and that decision was certified to Buncombe County Superior Court on December 27, 1983. The court of appeals reversed the Judgment of the trial court on the ground that the trial court had failed to make findings of fact and conclusions of law on the issues of third-party beneficiary and the contractual relationship between Chemical and Home Federal. However, the court of appeals did not order a new trial of the

matter but remanded it to the trial court on the existing record "for further proceedings consistent with this opinion." 65 N.C. at 251, 310 S.E.2d at ____.

Petition for Rehearing

On January 11, 1984, Chemical filed a petition under North Carolina Appellate Rule 31 for rehearing of that portion of the Judgment of the court of appeals denying a new trial. In its petition, Chemical argued that the failure of the Court of Appeals to order a new trial was contrary to North Carolina law, including the holding of the North Carolina Supreme Court in Farmers Bank v. Michael T. Brown Distributors, Inc., 307 N.C. 342, 298 S.E.2d 357 (1983), and by implication, that the failure of the court of appeals

to order a new trial was a denial of Chemical's due process rights.

By order entered February 7, 1984, the North Carolina Court of Appeals denied Chemical's petition for rehearing and certified the Order to the Clerk of Superior Court in Buncombe County. (Appendix 61.)

Petition for Discretionary Review to the Supreme Court of North Carolina

On February 22, 1984, Chemical filed a petition with the Supreme Court of North Carolina for discretionary review under North Carolina General Statute §7A-31 and Rule 15 of the North Carolina Rules of Appellate Procedure. In its petition, Chemical did not contest that part of the appellate court's ruling which reversed the Judgment of the trial

court. However, Chemical again contended that the ruling of the court of appeals remanding the case on the existing record without ordering a new trial was contrary to North Carolina law and by implication, the United States Constitution. In addition, Chemical requested the North Carolina Supreme Court to issue an Order certifying the case for review on the grounds that the subject matter of the appeal had significant public interest and involved legal principles of major significance to the jurisprudence of the State of North Carolina and presented issues which had not been decided by the courts in North Carolina.

On April 3, 1984, the supreme court entered an Order denying Chemical's Petition for Discretionary Review. That

Order was certified to the North Carolina Court of Appeals by the Clerk of the Supreme Court of North Carolina on April 5, 1984, and on April 9, 1984 the Clerk of the North Carolina Court of Appeals certified the denial of the Petition for Discretionary Review to the Clerk of Superior Court of Buncombe County. (Appendix 65.)

## REASONS FOR GRANTING THE WRIT

The gravamen of Chemical's complaint was that a contractual relationship existed between it and Home Federal which required Home Federal to purchase the construction loan note and accept an assignment of the deed of trust held by Chemical for the Landmark Hotel. In the alternative, Chemical argued that it was a third-party beneficiary of Home

Federal's permanent loan commitment to Landmark. Since the Judgment of the trial court was devoid of any findings of fact or conclusions of law with respect to these two issues, the North Carolina court of appeals correctly reversed the decision. However, the decision of the Court of Appeals remanding the case to the trial court without ordering a new trial conflicts with the law of the State of North Carolina as set forth in Farmers Bank, supra, and has thereby deprived Chemical of its right to an opportunity for a full hearing, as guaranteed by the due process clause of the fourteenth amendment of the United States Constitution.

In Farmers Bank, as in this action, the case was tried without a jury. In both cases the trial courts made certain

findings of fact and conclusions of law on some of the issues in the cases but failed to make all the necessary findings arising under the pleadings and the evidence. The North Carolina Supreme Court in Farmers Bank vacated the order of the trial court and ordered a new "hearing" so that the court could make adequate and appropriate findings of fact and conclusions of law. It is the contention of Chemical that a new "hearing" is synonymous with a new trial since the trial court's decision in the Farmers Bank case was made as the result of an actual trial.

There are other North Carolina decisions which also support Chemical's argument for a new trial. See O'Grady v. First National Bank, 296 N.C. 212, 250 S.E.2d 587 (1978); Baysdon v.

Nationwide Mutual Fire Insurance Co., 259 N.C. 181, 130 S.E.2d 311 (1963); Conrad v. Jones, 31 N.C. App. 75, 228 S.E.2d 618 (1976).

The instant case is analogous to the Conrad case in which the plaintiff sought a mandatory injunction ordering the defendants to disconnect a sewer line constructed by them from an eight inch line allegedly owned by one of the plaintiffs and a permanent injunction restraining the defendants from reconnecting their sewer line to the plaintiff's sewer line. The action was tried without a jury, and the court made findings of fact and concluded that the plaintiffs were not entitled to equitable relief.

On appeal by the plaintiffs, the North Carolina Court of Appeals reversed

the trial court, vacated the judgment and ordered a new trial because the trial court failed to make any findings with respect to what interest, if any, the plaintiffs had in the sewer line, and thus whether they were entitled to equitable relief. 31 N.C. App. at 79, 228 S.E.2d at 620. As in Conrad, until the trial court has determined the fundamental question of whether a contract exists between Chemical and Home Federal, that court cannot determine the other issues presented in the case. Nevertheless it did undertake to rule on many other questions. Since the new judgment may thus be tainted by the old judgment, Chemical is entitled to a new trial. Accord, Quick v. Quick, 305 N.C. 446, 290

S.E.2d 653 (1982); Rock v. Ballou, 286 N.C. 99, 209 S.E.2d 476 (1974).

The effect of the decision of the North Carolina Court of Appeals is to deprive Chemical of property (a money judgment) without affording it an opportunity to be fully heard in violation of Chemical's due process rights. Although the fourteenth amendment does not assure litigants immunity from all judicial error, "if the error is gross and obvious, comming close to the boundary of arbitrary action, there may be a violation of the guaranty." 16 Am. Jur. 2d, Constitutional Law § 819 at 99. Under this Court's holding in Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), Chemical is entitled to a new trial.

In Brinkerhoff-Faris, the plaintiff as trustee for its stockholders, filed suit in a Missouri state court seeking to enjoin a county treasurer from collecting part of the taxes assessed against the bank's stockholders on the shares of its stock. Plaintiff alleged that the assessor had intentionally and systematically discriminated against the stockholders by assessing bank stock at full value while omitting to assess certain classes of property and assessing other classes of property at 75% or less of their value. The trial court refused the injunction without opinion or findings of fact.

On appeal, the Supreme Court of Missouri affirmed the trial court and held that the plaintiff should have filed its complaint before the state tax

commission at any time before the tax books were delivered so that the commission could have granted a hearing and heard evidence with respect to the valuations complained of. The court further stated that if the commission found that the charges contained in the complaint were true, it could have ordered the valuations lowered. In so ruling, the Supreme Court of Missouri expressly overruled its decision six years before that the commission lacked the authority to provide the type of relief requested by the plaintiff.

The plaintiff filed a petition for rehearing on the ground that in denying relief because of the newly found powers of the commission, the court had violated the due process clause of the fourteenth

amendment. The petition for rehearing was denied, and thereafter the plaintiff petitioned this Court for certiorari.

The United States Supreme Court granted the petition for certiorari and reversed the state court. The Supreme Court found the Missouri Supreme Court had denied plaintiff's due process rights because the effect of its judgment was to deprive the plaintiff of property without affording it an opportunity to be heard in its defense.

In reaching its conclusion that the Missouri State Supreme Court had violated the plaintiff's due process rights, the United States Supreme Court examined the concept of due process violations committed by the judiciary. It stated:

> "The federal guaranty of due process extends to state action

through its judicial, as well as through its legislative, executive, or administrative, branch of government.

It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court.

...

But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all

> existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Id. at 680-682; 50 S.Ct. at 4.

It is clear that the trial court misperceived this case from the outset in that it failed to make findings of fact and conclusions of law on the fundamental issues in the case. Unless Chemical is awarded a new trial, it will be deprived of an opportunity to an impartial and full hearing on its case against Home Federal.

## CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted, this _____ day of June, 1984.

Sydnor Thompson

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# APPENDIX

APPENDIX:

Appendix 1

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|---|---|
| STATE OF NORTH CAROLINA<br>COUNTY OF BUNCOMBE | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR COURT DIVISION<br>76 CVS 2491 |
| CHEMICAL REALTY CORPORATION,<br><br>Plaintiff<br><br>vs.<br><br>HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF HOLLYWOOD,<br><br>Defendant. | JUDGMENT<br><br>(Filed June 29, 1982) |

THIS CAUSE coming on to be heard without a jury before the undersigned Judge Presiding at the civil term of Superior Court of Buncombe County beginning on September 22, 1980; and based upon the testimony of the witnesses at the trial of this action, the depositions or portions of the depositions

introduced at the trial, the exhibits of the parties introduced at the trial and the pleadings and the stipulations between the parties, the Court makes the following

FINDINGS OF FACT:

1. The Plaintiff, Chemical Realty Corporation, (hereinafter called Chemical) is a New York Corporation with its principal office in New York, New York, and was at all times relevant to this action engaged in the business of making construction and other types of real estate loans.

2. Home Federal Savings and Loan Association (hereinafter called Home Federal) is a corporation with its principal office in Hollywood, Florida, having originally been chartered as a

Federal Savings and Loan Association under the acts of Congress. On June 2, 1980, Home Federal became chartered as a State Savings and Loan Association regulated under the laws of the State of Florida and operated under the name of Home Savings Association of Florida.

3. Overland Investments, Ltd., a partnership, in which F. Earl Crawford, Jr., (hereinafter called Crawford) is a partner, entered into a contract with the Housing Authority of the City of Asheville for the purchase of lots 16-B and 16-C redevelopment in civic redevelopment project number NCR-13 by agreement dated July 15, 1971 and recorded in Book 1044 at page 143 in the Office of the Register of Deeds of Buncombe County.

Appendix 4

4. In the early spring of 1972, Asheville Development Associates, a North Carolina partnership composed of F. Earl Crawford, Jr. and others, was formed to build the hotel which Overland Investments, Ltd. had proposed to build. The contract for sale of land for private development was assumed by Asheville Development Associates by agreement between the Housing Authority of the City of Asheville, Overland Investment, Ltd., and said Asheville Development Associates dated August 12, 1972 recorded in Deed Book 1067 at page 29 in the Office of the Register of Deeds of Buncombe County. The Housing Authority of the City of Asheville conveyed to Asheville Development Associates lots 16-B and 16-C in civic redevelopment project NCR-13 in the City of Asheville, Buncombe County,

North Carolina, by deed dated February 19, 1973, and recorded in Book 1076 at page 312 in the Office of the Register of Deeds of Buncombe County.

5. Crawford began looking for a permanent lender for the project who would, for a commitment fee, commit itself to make a long term mortgage loan on the project. He contacted Atlantic Mortgage and Investment Company (called Atlantic) in Winston-Salem, North Carolina, a mortgage brokerage company, which agreed to help find him a permanent lender and in early 1972, Wallace Associates, a New York Brokerage Company, put Atlantic and Crawford in contact with Home Federal.

6. Representatives of Atlantic met with Thomas Wohl, the President of Home Federal, at his offices in Hollywood,

Florida, with reference to a permanent loan for the proposed project. A meeting was then arranged in Asheville between Wohl, Crawford, J.P. Lauffer, the President of Atlantic and Michael Burroughs, another officer of Atlantic. At the meeting, Wohl inspected the proposed hotel site and negotiated some of the terms of the permanent loan commitment with Crawford.

7. Wohl prepared a permanent loan commitment letter from Home Federal to Atlantic dated April 14, 1972, and either mailed or delivered it in person to Atlantic for forwarding to its proposed borrower for approval and execution. Home Federal's commitment letter dated April 14, 1972, stated that its $6,000,000.00 commitment for a proposed 300 room convention hotel in Asheville, North

Carolina, as described in a feasibility report and was subject to certain conditions as set forth in said letter and in part provided:

A. The amount of the commitment for $6,000,000.00;

B. MAI appraisal was to be obtained indicating a value of the real estate not less than $8,000,000.00;

C. The proceeds of the permanent loan were to be disbursed upon full completion of the hotel project in accordance with the plans and specifications and upon the complete furnishing and equipping of the facility;

D. The interest rate would be 9 1/2% including one-tenth of one percent available for service to the mortgage company to be made for a period of twenty-four years and pursuant to all existing federal home loan bank regulations;

E. The loan was made subject to a management contract acceptable to Home Federal to be executed by the borrower and the Hyatt-House Hotel Corporation;

F. Home Federal was to have a valid first lien on the real property under the laws of the State of North Carolina with title insurance to be provided by a company acceptable to Home Federal;

G. Any and all expenses incident to the making of said loan must be paid by the borrower;

H. A commitment fee of $60,000.00 for one (1) year was to be paid and received by May 15, 1972, and the commitment could be extended for additional periods of time based on an additional fee of $30,000.00 for each six-months extension. Such additional fee to be paid 15 days prior to the expiration date of the prior commitment as long as the commitment remained in good standing;

I. A commitment would continue to be valid and effective, but would automatically terminate upon the association's failure to receive written notification from all applicable government authorities indicating that the completed project has been approved by them and that it can be operated and utilized in accordance with the assumptions made in the feasibility report

> or the adjudication of the borrower as bankrupt or insolvent by a court of competent jurisdiction or an order of such court, and if such adjudication or order remained in force for a period of 40 days.

8. Atlantic forwarded the April 14, 1972 commitment letter to Crawford in Asheville for the borrower's approval and execution. Crawford executed a copy of the commitment letter on behalf of the proposed borrower and delivered it to J. Michael Burroughs of Atlantic for forwarding to Home Federal together with a check for the $60,000.00 commitment fee and a cover letter addressed to Home Federal dated May 15, 1972 requesting certain changes in the commitment. Burroughs then mailed the cover letter requesting the said changes together with the executed copy of the commitment

letter and the commitment fee to Home Federal by letter dated May 24, 1972. Home Federal amended its April 14, 1972 commitment letter to comply with the changes requested in Crawford's letter of May 15, 1972. The changes being that Crawford was to execute a nondivestiture agreement satisfactory to Home Federal's counsel and Home Federal would return the commitment fees paid to it if it did not approve the MAI appraisal, the management contract or the plans for the construction of the hotel.

9. Home Federal objected to the proposed management contract of Hyatt because it required Home Federal to subordinate the first lien of the deed of trust which it had required under its commitment letter as security for its

loan to Hyatt House Corporation proposed management contract.

10. In October 1972, Crawford proposed Motor Inn Management, Inc., a North Carolina Corporation, as the management company for the hotel and by letter of November 13, 1972, Home Federal agreed to accept Motor Inn Management as the management company for the hotel and amended its April 14, 1972 commitment letter to that effect.

11. At the request of Crawford, Atlantic began looking for a construction lender for the proposed project for Asheville Development Associates in the fall of 1972. Chemical was approached by Cooper-Horowitz, a New York brokerage firm. Chemical met with Crawford, Michael Burroughs of Atlantic and a representative of Cooper-Horowitz. A

proposed construction loan commitment was submitted to Chemical's commercial committee on December 12, 1972, and Chemical issued a construction loan commitment to Asheville Development Associates on December 18, 1972.

12. On December 26, 1972, Asheville Development Associates entered into a management contract with Motor Inn Management, Inc. By letter of January 3, 1973, Atlantic delivered the Motor Inn Management letter agreement to Home Federal together with a copy of the Motor Inn Management contract. Home Federal approved the Motor Inn Management contract and accepted the said letter agreement by signing a copy of the January 3, 1973 letter from Atlantic. The management contract granted certain

termination rights to Landmark as owner and to Motor Inn Management, Inc. as manager.

13. Asheville Development Associates deeded lots 16-B and 16-C in civic redevelopment project NCR-13, above referred to in paragraph 4 to Landmark Hotel, Inc. (called Landmark) on April 13, 1973, and assigned all rights under the Motor Inn Management Contract to Landmark.

14. Home Federal learned of the commitment of the proposed construction lender by letter dated January 13, 1973, from Atlantic after the construction loan commitment had been issued. In compliance with one of the conditions of Home Federal's permanent loan commitment dated April 14, 1972, Landmark submitted a proposed MAI valuation report dated

December 4, 1972 placing an evaluation of $8,200,000.00 on the proposed project when completed. The opinion and report being based in part on anticipated income and expenses in the operation of the facility.

15. Negotiations were entered into between Landmark and Chemical in an effort to arrange for the closing of Home Federal's permanent loan and the paying off of Chemical's construction loan. Atlantic represented the Borrower, Landmark, during these negotiations.

16. Home Federal, by Wohl, executed an undated letter being Defendant's Exhibit 154 for identification purposes.

17. Prior to the closing of the construction loan, the Housing Authority of the City of Asheville and Chemical through Merritt and Harris, a New York

Engineering Firm, approved the building plans and specifications as required.

18. Chemical closed the construction loan to Landmark on April 13, 1973 in New York, New York. Those being present at the closing were: James Offut, John Ready, attorney for Chemical; Crawford, President of Landmark Hotel, Inc.; William E. Greene, Esquire, counsel for Landmark; Anthony Fiorella and Moriarty of Chicago Title Insurance Company. Home Federal was not represented or advised of the date for closing of the construction loan prior to the closing.

19. At the closing of the construction loan on April 13, 1973, the building loan mortgage note in the principal amount of $6,000,000.00 was delivered to Chemical. The maturity date for the building loan mortgage note was

September 14, 1974. Attached to the building loan mortgage note marked as Exhibit "A," was a first mortgage real estate note executed by Landmark and the guarantors in the amount of $6,000,000.00 which was also executed and delivered by Landmark and the named guarantors at the closing. The maturity date of the building loan mortgage note and the loan evidenced thereby was September 14, 1974. The first mortgage real estate note attached as Exhibit "A" to the building loan mortgage note provided that it was secured by a first mortgage or Deed of Trust of even date therewith from Landmark to Thomas W. Wharton, Trustee.

20. Landmark made and delivered to Chemical at the same said closing a Deed of Trust dated April 13, 1973, from Landmark Hotel, Inc. to Sydnor Thompson,

Trustee, which was secured by the building loan mortgage note also known as the construction loan Deed of Trust. The construction loan Deed of Trust is recorded in Book 812 at page 722 in the Office of the Register of Deeds of Buncombe County, North Carolina, and the permanent loan Deed of Trust is recorded in Book 814 [sic] at page 725 in the Office of the Register of Deeds of Buncombe County.

21. At the closing of the construction loan on April 13, 1973, the management agreement between Asheville Development Associates and Motor Inn Management, Inc. dated December 26, 1972 and all the rights of Landmark thereunder were conditionally assigned to Chemical without the consent or knowledge of Home Federal.

22. Chemical advanced a total of $150,000.00 of the construction loan proceeds to Landmark; $90,000.00 of which was to permit Landmark to extend the permanent loan commitment through October 14, 1974; and $60,000.00 to reimburse Landmark for the fee it had initially paid for the permanent loan commitment.

23. On April 13, 1973, and subsequent to the closing of the construction loan, Chicago Title Insurance Company issued policy number 34-005-07-03893 dated May 21, 1973 to Chemical as the insured insuring the Deed of Trust dated April 13, 1973 from Landmark Hotel, Inc. to Sydnor Thompson, Trustee for Chemical Realty Corporation, securing the note in the sum of $6,000,000.00 and filed in Deed Book 812

at page 693 in the Office of the Register of Deeds of Buncombe County.

24. Landmark entered into a construction contract for the construction of the hotel with D.C. Turner Construction Company prior to the closing of the construction loan.

25. Chemical made monthly advances to Landmark under its building and loan agreement in the total amount of $4,861,274.38. The first advance being made on April 13, 1973 and the last advance being made on September 17, 1974. An additional $5,975.05 was advanced by Chemical on October 10, 1974, and charged to the loan bringing the total amount advanced to Landmark or on its behalf on the construction loan to $4,867,249.43.

26. During the course of construction, Chemical's Engineers,

Merritt and Harris, inspected the construction on a monthly basis and certified to Chemical a percentage of completion each month.

27. In November, 1973, Atlantic notified Home Federal that Landmark had entered into a ground lease with Orbital Industries, Inc., and mailed to Home Federal a copy of the ground lease between Landmark and Orbital dated April 13, 1973, and a copy of a management agreement between Orbital and Development Consultants, Inc. dated April 13, 1973. A memorandum of this ground lease entitled "Memorandum of Lease" dated April 13, 1973 was recorded on December 28, 1973, in Book 1092 at page 655 in the Office of the Register of Deeds for Buncombe County. Atlantic requested that Home Federal approve the agreements with

Orbital by letters dated November 2, 1973 and January 17, 1974. Atlantic's January 17, 1974 letter stated that Chemical had requested this approval by Home Federal because paragraph 20 of the permanent loan Deed of Trust called for Home Federal's approval of any lease or sale of the security property. Home Federal advised Atlantic that it would not review or approve the ground lease or the management agreement until the closing of its permanent loan. The management agreement with the Development Consultants, Inc. for the hotel had not been approved by Motor Inn Management, Inc. Crawford was the principal party in Development Consultants, Inc.

28. By letter dated March 20, 1974, Landmark directed Motor Inn Management, Inc. to stop the performance of all

further work and responsibilities under the management contract. Landmark instituted a civil action against Motor Inn Management, Inc. on April 5, 1974 for damages as for breach of the management contract between the parties.

29. On May 15, 1974, Landmark recorded a Deed of Trust to J. William Russell, Trustee on the hotel property, dated April 13, 1973, securing a demand note for $250,000.00, said Deed of Trust being recorded in Deed Book 829 at page 641 in the Office of the Register of Deeds of Buncombe County, North Carolina. The Deed of Trust had not been cancelled on October 14, 1974.

30. On June 24, 1974, representatives of Chemical met with Crawford and stated that the management contract with Motor Inn Management, Inc. was specific-

ally called for by the permanent loan commitment and that the permanent loan commitment was in jeopardy because of the difficulties with the management contract. Crawford expressed a desire to have in-house management under his manager, David Botball.

31. Wohl of Home Federal visited the construction site in the last week of June 1974 and found that Landmark had terminated Motor Inn Management as the management company for the hotel. Wohl immediately wrote Atlantic, Chemical and Crawford by letter dated June 28, 1974 advising them of his concerns with the management arrangements of the lease agreement with Orbital and the litigation pending between Landmark and Motor Inn Management, Inc. Representatives of Chemical met with Crawford and Wohl in

Hollywood, Florida, on July 26, 1974 at which time Wohl again expressed his concerns with reference to the management contracts, Orbital and pending litigation. Crawford sought approval from Wohl for in-house management under David Botball, the general manager of the hotel, and was asked by Wohl to submit a brochure outlining his proposal; however, no outline was forth coming and David Botball left the employment of Landmark in September, 1974.

32. Following July, 1974, no further request was made of Home Federal to accept a substitute management company for Motor Inn Management, Inc.

33. By letter dated July 23, 1974, Motor Inn Management, Inc. notified Landmark, Chemical and Home Federal that Landmark had breached its management

contract and that Motor Inn Management's obligations were terminated because of the management contract having been breached by Landmark Hotel as set forth in said letter.

34. Landmark continued to prosecute its action against Motor Inn Management, Inc. in 74-CVS-1597, Buncombe County, and Motor Inn Management, Inc. filed an answer and counterclaim against Landmark and crossclaim against Chemical and Home Federal therein for damages and a determination of its obligations to Chemical and Home Federal under its management contract with Landmark and its letters to Chemical and Home Federal.

35. On September 25, 1974, the Public Safety Department of the City of Asheville issued a final certificate of occupancy and compliance for the hotel.

36. On October 10, 1974, Merritt and Harris issued its certificate, certifying the hotel was substantially complete in accordance with the approved plans and specifications as did Gene Whittington, architect for Landmark.

37. By letter dated October 3, 1974, Crawford advised Atlantic, Chemical and Home Federal that the construction of the hotel was complete and that Landmark was ready to close the permanent loan and requested that Home Federal come to Asheville and inspect the property and the papers which were being prepared pursuant to closing the permanent loan. Crawford's letter was received by Home Federal on October 8, 1974.

38. Chemical notified Home Federal by letter and a confirming telegram dated October 7, 1974, that they would be

present at Home Federal's Hollywood offices at 10:30 a.m., on October 11, 1974, to make a tender for the purpose of closing the permanent loan. Crawford and Chemical were notified that Home Federal had received nothing with regard to a management company to replace Motor Inn Management Inc. in order to satisfy the management phase of the permanent loan commitment.

39. A certificate of completion for the hotel was not issued upon request during October, 1974, and was not issued until November, 1976. On October 10, 1974, Landmark closed the hotel and made no further efforts to close the permanent loan. The hotel remained closed at all times through October 14, 1974, and did not reopen for business until 1977 under

new owners. On October 11, 1974, Chemical sent a telegram to Home Federal advising that Chemical's representatives would arrive at 2:00 p.m. on October 14, 1974, to tender documents under Home Federal's permanent loan commitment.

40. As of October 14, 1974, the title insurance issued with respect to the hotel was policy number 34-005-02-03891 issued by Chicago Title Insurance Company to Chemical as the insured. The title insurance policy provided that only the amounts disbursed under the construction loan were insured with no reference to the permanent loan being insured. Landmark did not request an extension of its permanent loan commitment in compliance with the terms of said commitment or did Chemical

request an extension of the permanent loan commitment and neither Landmark or Chemical made tender the proper fee for such an extension of the permanent loan commitment.

41. The real property and the hotel which was located on the property was on October 14, 1974, subject to mechanics and materialmens liens; liens for certain fixtures and equipment, a Deed of Trust from Landmark Hotel, Inc. to William Russell, Trustee for bearer securing $250,000.00 recorded in Deed of Trust Book 829 page 641.

BASED UPON THE FOREGOING Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW:

1. Home Federal issued a permanent loan commitment to Landmark by letter of

April 14, 1972, which was amended by three subsequent letters: one (1) dated May 24, 1972, one (1) dated November 13, 1973 and another dated March 28, 1973. Said letters dated April 14, 1972, May 24, 1972, November 13, 1972 and March 28, 1973 are all the documents comprising Home Federal's permanent loan commitment and contain all terms and conditions thereof.

2. Chemical issued its construction loan commitment to Landmark by letter dated December 18, 1972, and closed its construction loan with Landmark on April 13, 1973.

3. The permanent loan commitment was an agreement between Home Federal and Landmark entered into without reference to Chemical or its construction loan before Chemical issued its construction

loan commitment and amended for the last time before Chemical closed its construction loan. Chemical was not a party to the permanent loan commitment.

4. On October 14, 1974, no enforceable management contract was in effect for the hotel which had been approved by Home Federal as required by previously executed documents. On October 14, 1974, neither Landmark or Chemical could deliver a permanent loan Deed of Trust evidencing a valid first lien on the hotel real property to secure a $6,000,000.00 loan evidenced by the first mortgage real estate note.

5. On October 14, 1974, Landmark had closed the hotel, was insolvent and without sufficient funds to operate the hotel.

6. That the building loan mortgage note and construction loan Deed of Trust became due and payable on September 14, 1974 and at all times subsequent thereto was in default and was in default on October 14, 1974 by the terms upon its face.

7. No extension of the permanent loan commitment had been made or had one been requested under the terms and conditions of the permanent loan commitment on October 14, 1974.

8. On October 14, 1974, Landmark had abandoned the hotel project and tendered the hotel to Chemical.

BASED UPON THE FOREGOING Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That Judgment be entered for the Defendant, Home Federal Savings and Loan

Association of Hollywood, Florida, and that the Plaintiff have and recover nothing of the Defendant.

2. That the costs of this action be taxed against the Plaintiff, Chemical Realty Corporation.

This the 29th day of June, 1982.

/s/ C. Walter Allen
C. WALTER ALLEN
Resident Superior Court Judge
Twenty-Eighth Judicial District
Buncombe County, North Carolina

Appendix 34

NO. 8228SC1265

NORTH CAROLINA COURT OF APPEALS

Filed 6 December 1983

| | | |
|---|---|---|
| CHEMICAL REALTY CORP-<br>ORATION | ) | |
| v. | ) | |
| HOME FEDERAL SAVINGS<br>AND LOAN ASSOCIATION<br>OF HOLLYWOOD | ) | Buncombe County<br>No: 76CVS2491 |

Appeal by plaintiff from Allen, Judge. Judgment entered 29 June 1982 in Buncombe County Superior Court. Heard in the Court of Appeals 24 October 1983.

Plaintiff sued defendant to recover damages for an alleged breach of contract. In its complaint, plaintiff claimed that the defendant had agreed to a "takeout" or purchase of the plaintiff's construction loan to Landmark Hotel, Inc. (hereinafter, Landmark).

Plaintiff alleged that it had made a construction loan to Landmark in reliance on defendant's promise to provide the long-term financing of the Landmark hotel. Defendant refused to make the long-term loan to Landmark after plaintiff had advanced funds under the construction loan.

Plaintiff alleged that defendant had a contractual duty to fund the long-term loan for two reasons. First, defendant had issued a permanent loan commitment to Landmark in which defendant promised, under certain terms, to provide long-term financing for Landmark's hotel. Plaintiff alleged that it was a third party beneficiary of defendant's permanent loan commitment to Landmark. Second, defendant sent a letter to

plaintiff agreeing to purchase the construction loan note and accept an assignment of the deed of trust held by plaintiff as long as there had been no default of the terms of the permanent loan commitment. Plaintiff alleged that this letter created a direct contractual duty running from defendant to plaintiff. Plaintiff's amended complaint asked for $5,694,951.56 in damages.

In its answer, defendant denied that plaintiff was a third party beneficiary of the permanent loan commitment and denied that its letter to plaintiff formed a contract. Defendant also alleged that it had no obligation under the permanent loan commitment since the terms of the commitment had not been fulfilled.

## Appendix 37

The stipulations and evidence at trial tended to show the following. Landmark's predecessor-in-interest had acquired some land in Asheville on which it planned to build a hotel. It entered into negotiations with defendant for a long-term mortgage loan to finance the hotel. On 14 April 1972 defendant issued a permanent loan commitment letter which Landmark's predecessor-in-interest executed and returned along with a $60,000.00 commitment fee. The commitment letter was later modified to substitute Landmark as the borrower, and in other minor aspects.

The commitment letter included the following pertinent terms. Defendant committed itself to loan $6,000,000.00 for the proposed hotel, as described in a feasibility report, to be disbursed upon

completion of the hotel. The loan was conditioned on receipt of an appraisal of not less than $8,000,000.00 for the real estate to be encumbered. The loan was "subject to an acceptable management contract to be executed by the borrower and the Hyatt House Hotel Corp." It was also subject to defendant being placed in the position of a mortgagee holding a valid first lien, with title insurance to be provided by a company acceptable to defendant. Payment of the $60,000.00 commitment fee by 15 May 1972 kept the commitment in effect for one year from the date of the 14 April 1972 commitment letter. Six-month extensions of the commitment could be obtained by payment of an additional $30,000.00 fee for each extension; however, any extension fee had to be paid fifteen days

prior to the expiration of the outstanding commitment. The commitment was to automatically terminate upon, among other things, the failure of defendant "to receive written certification from all applicable Government Authorities indicating that the completed project has been approved by them ...."

Landmark's proposed contract with Hyatt House Hotel Corp. was rejected by defendant because Hyatt wanted defendant to subordinate its interests as first mortgagee to Hyatt. Landmark then proposed Motor Inn Management, Inc. (hereinafter, MIM) and on 13 November 1972 defendant agreed to accept MIM as the management company instead of Hyatt.

Also in November, 1972, a broker approached plaintiff about becoming the construction lender for the Landmark

project. Plaintiff reviewed the permanent loan commitment of defendant and issued a construction loan commitment to Landmark on the condition that Landmark, plaintiff, and defendant would enter into a tripartite buy-sell agreement whereby plaintiff's construction loan would be repaid from the defendant's permanent loan. Not until after the construction loan commitment had been issued in December of 1972 did plaintiff enter into negotiations with defendant for this proposed takeout agreement. Defendant refused to enter the tripartite agreement proposed by plaintiff. Defendant felt that the proposed agreement would have forced it to take out the construction loan "come hell or high water." The plaintiff modified its construction loan commitment on 7

February 1973 to eliminate the requirement of a tripartite agreement.

Plaintiff and defendant continued to discuss the arrangements by which defendant would become Landmark's permanent lender. Plaintiff and an intermediary broker worked out terms that were acceptable to defendant. These terms were set forth in an undated letter executed by defendant and delivered to the intermediary in early April, 1973. The intermediary passed the undated letter on to plaintiff. The letter stated in part that,

> This is to confirm that the Commitment and amendments, copies of which are attached hereto, is in full force and effect as of the date hereof, that there have been no modifications thereof and that no modifications shall be made without your consent and pursuant to such commitment. This is to confirm that:

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1. We have received, in full satisfaction of the terms of paragraph numbered 1 of the Commitment, an MAI appraisal indicating a value in the Premises, upon completion of the improvements of at least $8,000,000;

2. We have reviewed the Chicago Title Insurance Company commitment for Title Insurance No. 73-U-00006 attached hereto as marked up with deletions crossed through and additions noted thereon; Chicago Title Insurance Company is acceptable to us as the title insurer and policy to be issued to us pursuant to paragraph 5 of our commitment ... will be satisfactory and acceptable by us.

....

4. We have found acceptable and approved the Management Contract dated December 26, 1972 between Asheville Development Associates and Motor Inn Management, Inc. as assigned to the Borrower satisfying the terms of paragraph numbered 4 of the Commitment;

5. We have received the $60,000 commitment fee referred to in paragraph numbered 8 on the Commitment and agree that we will accept from you the additional $90,000 commitment fee at the closing of the construction loan

whereupon the Commitment will be automatically extended to October 14, 1974;

6. The issuance of (a) the Certificate of Completion referred to in Section 307 of the Contract for Sale of Land for Private Redevelopment by and between Overland Investments, Ltd. and Housing Authority of The City of Asheville and (b) a Certificate of Occupancy, will satisfy the conditions of paragraph numbered 9 (a) of the Commitment;

....

10. We have approved, in all respects the First Mortgage Real Estate Note and Deed of Trust, copies of which are attached hereto, and agree that at the appropriate time, as provided in the Commitment, we will purchase said First Real Estate Note from you, without recourse, and accept the assignment of said Deed of Trust provided however that the loan is not in default under the terms of our Commitment or our loan documents. We have also approved the form of the assignment of the Deed of Trust to be made by you to us, a copy of which is attached hereto.

11. We have reviewed the Construction Note and Construction Deed of Trust attached hereto including the language incorporating

> therein the First Mortgage Real Estate Note and Deed of Trust referred to in 10 above. We understand that the Guaranty and Endorsement on the Construction Note will be executed at the closing of your construction loan with Landmark Hotel, Inc. and will survive an assignment of your note to us. We understand that the terms and provisions of the First Mortgage Real Estate Note and Deed of Trust referred to in 10 above will automatically become operative upon an assignment of the Deed of Trust and Note to us from you.

Defendant extended its original commitment to 15 April 1973 "for purposes of facilitating the closing of the construction loan." Plaintiff closed the construction loan to Landmark on 13 April 1973. No representative of defendant was present at the construction loan closing. Plaintiff disbursed $30,000.00 directly to defendant the same day to obtain a six-month extension of the permanent loan commitment. It disbursed another

$60,000.00 a few days later to extend the permanent loan commitment through 14 October 1974.

At the closing, Landmark executed a building loan mortgage note in the principal amount of $6,000,000.00 and delivered it to plaintiff. Attached to the building loan mortgage note as Exhibit A was a first mortgage real estate note in the principal amount of $6,000,000.00, also executed by Landmark and delivered to plaintiff. The building loan mortgage note provided that if it was purchased by defendants, its terms would be superseded by those of the first mortgage real estate note.

The building loan mortgage note was secured by a construction loan deed of trust executed by Landmark on the same day. Plaintiff was the beneficiary and

Sydnor Thompson served as trustee. Attached to the construction loan deed of trust as Exhibit B was a permanent loan deed of trust executed by Landmark. The trustee was Thomas Wharton, who represented the broker acting as an intermediary between plaintiff and defendant. The construction loan deed of trust provided that upon the purchase of the building loan mortgage note and the assignment of the construction loan deed of trust to defendant, the terms of the permanent loan deed of trust would supersede those of the construction loan deed of trust. The construction loan deed of trust, with the permanent loan deed of trust attached as Exhibit B, was recorded in the Buncombe County Office of the Register of Deeds.

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Plaintiff advanced $4,867,249.43 to Landmark from 13 April 1973 to 10 October 1974 under the construction loan. Landmark used the funds to build the hotel and prepare it for doing business. The construction was certified as substantially complete on 10 October 1974.

During construction of the hotel, several events occurred pertinent to the permanent loan commitment. The management contract with MIM appeared to be at an impasse, and MIM and Landmark sued each other for breach of that contract. Landmark ordered MIM to cease performance of its pre-opening duties in March, 1974. MIM notified all concerned parties in July of 1974 that it deemed its obligations to plaintiff and defendant terminated due to Landmark's breach of

the management contract. Defendant informed the plaintiff that it was worried about the collapse of the management contract and about a lease agreement between Landmark and Orbital Industries, Inc. Neither Landmark nor plaintiff proposed a substitute management company acceptable to defendant. The Housing Authority of Asheville refused to issue a certificate of completion, which had been requested, for the hotel in October, 1974.

Landmark was unable to pay all the bills for the hotel on 9 October 1974, and on that day, a representative of Landmark tendered the hotel keys to a representative of plaintiff, who refused to accept them. On 10 October 1974 Landmark closed the hotel due to a lack of operating funds.

Meanwhile, plaintiff informed the intermediary broker, by a letter dated 3 October 1974, that it and Landmark were ready to close the permanent loan with defendant. Plaintiff sent a telegram and a letter, both dated 7 October 1974, to defendant stating that it would tender the first real estate note and deed of trust on 11 October 1974 to defendant. On 11 October 1974 plaintiff sent defendant a telegram giving notice that plaintiff would tender the Landmark loan on 14 October 1974.

On 14 October 1974 representatives of plaintiff arrived at defendant's hometown office prepared to close the permanent loan to Landmark. Defendant refused plaintiff's tender of the construction loan note and deed of trust. Defendant indicated that the terms of the

permanent loan commitment had not been met and that the economy was too uncertain for it to finance as risky a venture as the hotel. Plaintiff then asked for an extension of the permanent loan commitment. Defendant refused this request.

Landmark filed a voluntary petition in bankruptcy on 18 November 1974. On 11 February 1976 plaintiff received permission to foreclose its deed of trust. Plaintiff held a public foreclosure sale three months later and was the successful bidder at $3,000,000.00. Plaintiff subsequently sold the property to its wholly-owned subsidiary, which in turn sold the hotel to Vector Hospitality Associates.

This action was filed on 20 December 1976 by plaintiff. The trial court denied

defendant's motion to dismiss for lack of jurisdiction. The trial court's order was upheld on appeal.

The case was then tried before the trial court sitting without a jury. After making findings of fact and conclusions of law, the trial court entered judgment for the defendant. Plaintiff appealed.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Sydnor Thompson, Fred T. Lowrance, and Sally Nan Barber; Herbert Hyde; Van Winkle, Buck, Wall, Starnes & Davis, by Larry McDevitt, for plaintiff.

McCoy, Weaver, Wiggins, Cleveland & Raper, by John E. Raper, Jr. and Richard M. Wiggins, and Redmond, Stevens, Loftin

& Currie, by John S. Stevens and Thomas R. West, for defendant.

WELLS, Judge.

Plaintiff first contends that the trial court erred in failing to find and conclude that a contract existed between plaintiff and defendant. Plaintiff also contends that the trial court should have found and concluded that it was a third party beneficiary of defendant's permanent loan commitment. We hold that the trial court did not adequately address these issues.[1]

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[1] In Chemical Realty Corp. v. Home Federal Savings & Loan Association of Hollywood, 40 N.C. App. 675, 253 S.E.2d 621, disc. rev. denied and app. dismissed, 297 N.C. 612, 257 S.E.2d 435 (1979), app. dismissed, 444 U.S. 1061, 100 S.Ct. 1000, 62 L.Ed.2d 744 (1980), we

(continued on next page)

G.S. §1A-1, Rule 52(a)(1) of the Rules of Civil Procedure requires a trial judge hearing a case without a jury to make findings of fact and conclusions of law. To comport with Rule 52(a)(1), the trial court must make "a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment." Quick v. Quick, 305 N.C. 446,

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upheld the trial court findings that a contract existed between Chemical and Landmark. These findings were made solely to establish jurisdiction over the defendant, do not go to the merits of this case or determine the contractual rights of plaintiff and defendant, and therefore do not constitute the law of the case on the respective contractual rights or obligations of plaintiff and defendant.

290 S.E.2d 653 (1982) (citation omitted). Rule 52(a)(1) does not require recitation of evidentiary facts, but it does require specific findings on the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached. Id. See also Farmers Bank v. Michael T. Brown Distributors, Inc., 307 N.C. 342, 298 S.E.2d 357 (1983).

Although the letter written by Home Federal to Chemical appears from [sic] an agreement supported by consideration by Home Federal to purchase Chemical's construction loan upon compliance with certain conditions precedent, the trial court's only finding of fact with respect to the letter was that "Home Federal, by Wohl, executed an undated letter being

Defendant's Exhibit 154 for identification purposes." This finding is an evidentiary fact, not an ultimate fact. The trial court failed to make any finding of fact regarding whether defendant owed any contractual duty to plaintiff. Such findings are necessary to a valid judgment in this action. As the North Carolina Supreme Court has stated,

> Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly

> exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 709, 268 S.E.2d 185 (1980).

Although the trial court's order contains more than forty-one separate findings of fact,[2] the evidence, stipulations, and pleadings in the instant case present questions of fact which were ignored in those findings, but which must be resolved before judgment can be entered. On remand, the following issues should be resolved by proper findings and conclusions.

(1) Was there a promise by defendant, supported by consideration, to

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[2]We note that some of the trial court's purported conclusions of law are only additional findings of fact.

plaintiff to purchase plaintiff's construction loan?

(2) If defendant made no promise, did defendant's actions provide the basis for plaintiff to become a Creditor beneficiary of defendant's permanent loan commitment?

(3) If plaintiff contracted with defendant, or had third party beneficiary status, what were the conditions precedent and material terms that had to be complied with before defendant's duty to plaintiff to perform arose?

(4) Were those terms and conditions substantially complied with?

(5) If Landmark and/or plaintiff had not fulfilled the conditions precedent and material terms

on 14 October 1974, did plaintiff timely request defendant to extend the permanent loan commitment beyond 14 October 1974?

(6) If plaintiff did make a timely request to extend the permanent loan commitment, to what extent did plaintiff incur foreseeable and ascertainable damages by defendant's refusal to extend?

Defendant contends that even if the trial court failed to make all the necessary findings arising under the evidence, the findings it made adverse to plaintiff and supported by the evidence are sufficient to sustain the trial court's conclusions and judgment. We cannot agree. The trial court's findings having failed to address crucial aspects of the rights and obligations of the parties arising upon the evidence, we can

make no assumptions as to what the result will be when the evidence in the case is properly sifted, addressed, and treated at the trial level.

The parties to this appeal have submitted extensive briefs; plaintiff has brought forward a number of exceptions we have not addressed; but we perceive that it would be untimely and unproductive for us to deal with plaintiff's other exceptions because of the obvious need for the heart of this case to be reconsidered at the trial level.

Because we perceive there are no questions raised in the appeal as to admission of evidence or credibility of witnesses, we conclude that it is unnecessary to order a new trial, and that the case may be properly considered on remand on the existing record.

For the reasons stated, the judgment of the trial court must be reversed and the case remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Chief Judge VAUGHN and Judge JOHNSON concur.

Appendix 61

NO. 8228SC1265

NORTH CAROLINA COURT OF APPEALS
**********

CHEMICAL REALTY CORP-
ORATION, Plaintiff

v.

HOME FEDERAL SAVINGS
AND LOAN ASSOCIATION
OF HOLLYWOOD,
Defendant

County: Buncombe
Number: 76CVS2491

(Filed February 7,
1984 12:47 p.m.)

**********

O R D E R

The following Order was entered:

"The petition filed in this cause on the 11th day of January, 1984, and designated Petition for Rehearing is denied.

By order of the Court this 7th day of February, 1984."

The above order is therefore certified to the Clerk of the Superior Court in Buncombe County, North Carolina.

Witness my hand and official seal this the 7th day of February, 1984.

/s/ Francis E. Dail
Clerk of the Court of Appeals

Appendix 63

No. 91P84 TWENTY-EIGHTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

**********

| | | |
|---|---|---|
| CHEMICAL REALTY CORPORATION | ) | ORDER DENYING PETITION FOR DISCRETIONARY REVIEW (8228SC1265) |
| v. | ) | |
| HOME FEDERAL SAVINGS and LOAN ASSOCIATION OF HOLLYWOOD | ) | |

**********

Upon consideration of the Plaintiff's petition filed in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

Appendix 64

"Denied by order of the Court in conference, this the 3rd day of April, 1984.

s/Frye, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of April, 1984.

/s/ J. Gregory Wallace
J. GREGORY WALLACE
Clerk of the Supreme Court

Appendix 65

NO. 8228SC1265

NORTH CAROLINA COURT OF APPEALS
**********

CHEMICAL REALTY CORP-
ORATION, Plaintiff

v.

County: Buncombe
No: 76CVS2491

HOME FEDERAL SAVINGS
AND LOAN ASSOCIATION
OF HOLLYWOOD,
Defendant

**********

Petition for Discretionary Review to review the decision of the Court of Appeals filed on December 6, 1983 was denied by order of the North Carolina Supreme Court on the 3rd day of April, 1984, and same has been certified to the North Carolina Court of Appeals;

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court Buncombe County that the North Carolina Supreme Court has

denied the Petition for Discretionary Review filed by petitioner in this cause.

Witness my hand and official seal this the 9th day of April, 1984.

/s/ Francis E. Dail
Clerk of the Court of Appeals

/s/ Jeanne Stakeman
by Deputy Clerk

# APPENDIX

## LIST OF PARENT CORPORATION, AFFILIATED CORPORATIONS, AND SUBSIDIARY CORPORATIONS PURSUANT TO RULE 28.1

Parent Corporation:

Chemical New York Corporation

Affiliated Corporations:

Albuquerque Capital Management, Inc.
Alexander, Scriver and Associates, Inc.
Brown & Company Securities Corporation
Chemgraphics Systems, Inc.
Chemical Bank
Chemical Business Credit Corporation
Chemical New York - N.V.
Chemical First State Corporation
Chemical Florida Banks, Inc.
Chemical Futures, Inc.
Chemical Investment Advisers, Inc.
Chemical Mortgage Company
Chemical New Jersey Corporation
Chemical New York Corporation-U.S.A.
Chemical New York Southwest, Inc.
Chemical Trust Company of Florida, N.A.
Dommerich Factors, Inc.
Favia, Hill & Associates, Inc.
Investment and Capital Management Corporation
Pronto, Inc.
Sunamerica Corporation

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The Portfolio Group, Inc.
Van Deventer & Hoch Inc.
Florida National Banks of Florida, Inc.
Gulf Stream Aero Space
S.W.I.F.T.

. Subsidiary Corporations:

There are seven (7) wholly owned subsidiaries which the petitioner is not required to list under Rule 28.1.

NO. 83-2137

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL REALTY CORPORATION,

Petitioner,

v.

HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF HOLLYWOOD,

Respondent.

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

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## QUESTIONS PRESENTED

I. Whether the United States Supreme Court has jurisdiction to review the Petition for Writ of Certiorari,

A. Where Petitioner did not raise the federal question in either of his petitions to the state courts below; and

B. Where the judgment sought to be reviewed is not "final" within the meaning of 28 U.S.C. Section 1257.

II. Whether the United States Supreme Court should grant discretionary review where Petitioner's Petition for Writ of Certiorari does not present a "special and important reason" in that neither the North Carolina Court of Appeals nor the North Carolina Supreme Court decided an important federal question and further in that, even if the question raised by Petitioner's Petition were an important federal question, the decision of the North Carolina Court of Appeals appealed from is not in conflict with decisions of the Supreme Court, a federal court of appeals or another state court.

III. Whether the North Carolina Court of Appeals deprived the Petitioner of its right to an opportunity to be heard, as guaranteed by the due process clause of the fourteenth amendment of the United States Constitution, when it remanded Petitioner's action to the trial court for further proceedings on the existing record instead of ordering a new trial.

IV. Whether the decision of the North Carolina Court of Appeals appealed from is in conflict with either the statutory or the case law of the State of North Carolina.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

Statutes and Rules

## OPINIONS BELOW

Respondent accepts and incorporates by reference the opinions cited by Petitioner in the Petition for Writ of Certiorari.

## JURISDICTIONAL GROUNDS

The judgment of the North Carolina Court of Appeals on December 6, 1983, reversing and remanding the action to the trial court for further proceedings on the existing record, is interlocutory in nature and not a final judgment for purposes of 28 U.S.C. Section 1257. In addition, Petitioner made no mention of the constitutional question of its right to an opportunity for a full hearing, as guaranteed by the due process clause of the fourteenth amendment to the United States Constitution, in either its petition to the North Carolina Court of

Appeals for a rehearing or in its petition to the North Carolina Supreme Court for discretionary review but instead has raised the issue for the first time in its Petition for Writ of Certiorari. For these reasons, this Court is without jurisdiction to review the judgment herein by writ of certiorari.

## STATUTES INVOLVED

Respondent accepts and incorporates by reference the statutes cited by Petitioner in the Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

Petitioner filed this action in the Buncombe County Superior Court on December 20, 1976, seeking to recover money damages for, inter alia, Home Federal's alleged breach of its permanent loan commitment to Landmark Hotel, Inc., former owner of the Landmark Hotel (now Inn on the

Plaza) in Asheville, North Carolina. Respondent answered, denying that Petitioner was a third party beneficiary of said permanent loan commitment and that there was no privity of contract between Petitioner and Respondent and alleging that, even if there were a contractual relationship between them, neither Petitioner nor Landmark Hotel, Inc. (the borrower) had satisfied the conditions precedent to Respondent's obligation to fund under its permanent loan commitment.

Two weeks before the trial began both parties filed motions for summary judgment based on affidavits and extensive depositions, filed extensive briefs in support of their motions and presented oral arguments for two days before the Honorable C. Walter Allen, Judge Presiding for the Buncombe County Superior Court.

Although Judge Allen denied both parties' motions, the hearing on these motions served to frame the issues and provide an outline of each party's position in the controversy.

The actual hearing of this case commenced on September 22, 1980, and lasted fourteen trial days through October 9, 1980. On the opening day of the trial of this case, Judge Allen entered a Pretrial Order. In that Order, Petitioner and Respondent consented to the admissibility, if relevant, of 150 exhibits, which Petitioner proposed to introduce, and of 214 exhibits, which Respondent proposed to introduce. Fifty-five statements of fact were stipulated to by the parties. Each party submitted a trial brief. Judge Allen heard testimony from thirty witnesses,

heard depositions of six witnesses read into evidence and admitted into evidence 170 documentary exhibits offered by Petitioner amd 224 documentary exhibits offered by Respondent. The trial transcript consists of 14 volumes containing more than 1800 pages exclusive of deposition testimony.

At the conclusion of all the evidence, Judge Allen requested that the parties prepare proposed judgments containing findings of fact and conclusions of law.

Judge Allen subsequently deferred the date when the proposed judgments were due until after the trial transcript had been prepared so that the proposed judgments could be cross-referenced to the trial transcript.

Respondent submitted a proposed judgment containing 27 conclusions of law

supported by 84 findings of fact. Each of the findings of fact in Respondent's proposed judgment was cross-referenced to the stipulations of fact of the Pretrial Order, documentary exhibits and witnesses' testimony on which it was based. In almost every instance, Respondent's findings of fact were supported by the testimony of both Petitioner's witnesses and witnesses not employed by Respondent. In addition, internal memoranda prepared by Petitioner's employees substantiated many of Respondent's proposed findings of fact.

On November 23, 1981, Judge Allen heard final arguments in the case, after receiving the parties' proposed judgments. Once again, the parties submitted extensive briefs.

Judge Allen considered the briefs, the evidence, the proposed judgments and the parties' closing arguments and on June 29, 1982, entered judgment in favor of Respondent. By the time judgment was entered, Judge Allen had read at least three briefs submitted by each party in support of its position, had heard the arguments of each party on its summary judgment motion, had been exposed to the stipulated facts, had heard the trial evidence for fourteen days, had read each party's proposed judgment, had had access to the complete trial transcript, and had heard final arguments by the parties' attorneys. The judgment was prepared and filed by Judge Allen without the benefit or guidance of Farmers Bank v. Michael T. Brown Distributors, Inc., 307 N.C. 342, 298 S.E.2d 357 (1983), which was not

filed by the Supreme Court until January 11, 1983.

Petitioner gave notice of appeal on July 7, 1982. On December 3, 1982, the Record of Appeal in this case was docketed with the North Carolina Court of Appeals.

On December 6, 1983, the North Carolina Court of Appeals filed its decision in this matter, and the case was certified to Buncombe County on December 27, 1983. The Court's decision reversed the judgment of the trial court and remanded the case to the trial court on the existing record "for further proceedings consistent with this opinion" on the ground that the trial court had failed to address certain legal issues before it and make conclusions of law and findings of fact thereon as required by Farmers

Bank v. Michael T. Brown Distributors, Inc., id.

On January 11, 1984, Petitioner filed a petition under Appellate Rule 31(a) for rehearing of the judgment of the Court of Appeals, seeking to obtain a new trial. In its petition for rehearing, Petitioner argued only that the failure to grant a new trial was contrary to North Carolina case law. Nowhere in the petition for rehearing did Petitioner raise, argue or mention, either expressly or by implication, that failure to grant a new trial would deny Petitioner its fourteenth amendment due process rights. (See Appendix pp. 1-16.)

By order entered February 7, 1984, the North Carolina Court of Appeals denied Petitioner's petition for rehearing and certified the order to the Clerk

of Superior Court in Buncombe County, North Carolina.

On February 22, 1984, Petitioner filed a petition with the North Carolina Supreme Court for discretionary review under N.C. Gen. Stat. Section 7A-31, and Rule 15 of the North Carolina Rules of Appellate Procedure. In its petition for discretionary review, Petitioner argued only that the decision of the Court of Appeals remanding the case on the existing record without ordering a new trial was contrary to North Carolina law. Again, nowhere in the petition for discretionary review did Petitioner raise, argue, or mention, expressly or by implication, that failure to grant a new trial would deny Petitioner its fourteenth amendment due process rights. (See Appendix pp. 17-36.)

On April 3, 1984, the North Carolina Supreme Court entered an Order denying Petitioner's petition for discretionary review. That Order was certified to the North Carolina Court of Appeals by the Clerk of the Supreme Court of North Carolina on April 5, 1984, and on April 9, 1984 the Clerk of the North Carolina Court of Appeals certified the denial of the petition for discretionary review to the Clerk of Superior Court of Buncombe County.

Respondent is informed that Petitioner filed with the Supreme Court of the United States its Petition for Writ of Certiorari on June 28, 1984, and its Notice of Appearance on July 13, 1984.

## REASONS FOR DENYING THE WRIT

### I. The United States Supreme Court is without jurisdiction to review the Petition for Writ of Certiorari

#### A. Where Petitioner has failed to raise the federal question in the state courts below

Petitioner is attempting to assert a federal constitutional issue which it did not raise in either its petition for rehearing or its petition for discretionary review and which was not ruled upon in the state courts below. (Appendix pp. 1-36.)

In Petitioner's Statement of the Case, it refers to the petition to the North Carolina Court of Appeals for rehearing in which ". . . Chemical argued that the failure of the court of appeals to order a new trial was contrary to North Carolina law . . . and by implication, that the failure of the Court of

Appeals to order a new trial was a denial of Chemical's due process rights." (Emphasis added.) (Petition for Writ of Certiorari pp. 10-11.) Petitioner further states in its Statement of the Case with respect to its petition to the North Carolina Supreme Court for discretionary review that the ruling was ". . . contrary to North Carolina law and by implication, the United States Constitution." (Emphasis added.) (Petition for Writ of Certiorari p. 12.)

Not once in either the petition for rehearing (Appendix pp. 1-16) or in the petition for discretionary review (Appendix pp. 17-36) did Petitioner raise or even mention that its rights as guaranteed by the due process clause of the fourteenth amendment had been violated. Nor was the issue raised or mentioned in

the opinion of the North Carolina Court of Appeals or in the orders of the North Carolina Court of Appeals denying the petition for rehearing and of the North Carolina Supreme Court denying the petition for discretionary review. The contention that Petitioner raised the constitutional issue in the state courts "by implication" should, on its face, be grounds for dismissal.

The Supreme Court of the United States has consistently held that it ". . . will not decide federal constitutional issues raised here for the first time on review of state court decisions." Cardinale v. Louisiana, 394 U.S. 437, 438 (1968).

In Tacon v. Arizona, 410 U.S. 351, 352 (1973), this Court stated, in dismissing the writ of certiorari as

improvidently granted, that "it appears that these broad questions were not raised by the petitioner below nor passed upon by the Arizona Supreme Court. We cannot decide issues raised for the first time here." The cases are consistent with its decision in Honeyman v. Hanan, 300 U.S. 14, 18-19 (1937), that it ". . . must appear affirmatively from the record, not only that the federal question was presented to the highest court of this state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause." (Emphasis added.) Accord Raley v. Ohio, 360 U.S. 423 (1959); Charleston Fed. Sav. & Loan Ass'n v. Alderson, 324 U.S. 182 (1944).

More recently, this Court has reiterated this question, in holding that

it was without jurisdiction to grant certiorari, where the Georgia Supreme Court had failed to rule on the federal issue raised by the petitioner there, as follows:

> At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.

Webb v. Webb, 451 U.S. 493, 502 (1981).

It does not appear affirmatively from the record nor does the Petition for Writ of Certiorari show that there was an explicit and timely insistence

by Petitioner in the state courts that it was denied its right of due process as guaranteed by the fourteenth amendment to the United States Constitution. In the Statement of the Case, Petitioner contends only that the issue was raised in the state courts "by implication". (Petition for Writ of Certiorari pp. 10-11 & 12.) This does not conform to Rule 21(h) of the Supreme Court Rules or prior rulings by this Court. Petitioner's Writ of Certiorari should be denied.

In deciding whether the question was "specially set up or claimed" within the meaning of §1257, "it is relevant and usually sufficient to ask whether the petitioners satisfied the state rules governing presentation of

issues." Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 334 (1968).

Rule 31(a) of the North Carolina Rules of Appellate Procedure, governing the petition for rehearing, states that "the petition shall state with particularity the points of fact or law which, in the opinion of the petitioner, the court has overlooked or misapprehended . . . ." (Emphasis added.) Rule 15(c) of the North Carolina Rules of Appellate Procedure, governing the petition for discretionary review, states: "The petition shall . . . set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under G.S. §7A-31 for discretionary review." (Emphasis added.)

If the Petitioner had desired to raise the federal question in the state courts, it would have been required to state said question with particularity in the petition for rehearing or set it forth plainly and concisely in the petition for discretionary review. It did neither. (Appendix pp. 1-16 and 17-36.) Thus, this Court lacks jurisdiction to consider the Petition for Writ of Certiorari.

B. Where the judgment sought to be reviewed is not final as required by 28 U.S.C. §1257

Neither the judgment of the North Carolina Court of Appeals nor the order denying discretionary review is "final" within the meaning of §1257. The North Carolina Court of Appeals has reversed and remanded the case to the trial

court for further proceedings consistent with its decision. It has not addressed or ruled upon the conclusions of law and findings of fact made by the trial court in its judgment pending the trial court's decision on certain issues which the Court of Appeals determined that the trial court had not adequately addressed and should address. Therefore, the judgment is not final.

The state court judgment must be

> [f]inal . . . in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.

Market Street Ry Co. v. Railroad Comm'n, 324 U.S. 548, 551 (1945).

In Collins v. Miller, 252 U.S. 364, 370 (1920), the Court stated that

the judgment, to be appealable, "should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved."

In determining the finality of a state court judgment, local law is a material, though not a decisive, factor. Gospel Army v. Los Angeles, 331 U.S. 543 (1947).

In Tridyn Indus.,Inc. v. American Mut. Ins. Co., 296 N.C. 486, 488, 251 S.E.2d 443, 444 (1979), the North Carolina Supreme Court stated:

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. . . an interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle

> and determine the entire controversy.

An interlocutory or intermediate determination, such as the decision of the North Carolina Court of Appeals, is not a final judgment for purposes of review by the Supreme Court. Market Street Ry Co. v. Railroad Comm'n, supra. A judgment or decree of a state appellate court, reversing an inferior court and remanding the case to the lower court for further judicial proceedings, is not a final judgment and cannot be reviewed by the United States Supreme Court. Prudential Ins. Co. v. Cheek, 252 U.S. 567 (1920); Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915).

For these reasons, this Court is without jurisdiction to review the judgment of the North Carolina Court of Appeals. The judgment is not final, and

the federal question was not raised in the state courts below and may not be the basis for a petition for writ of certiorari now.

## II. The Supreme Court should not exercise its discretion to grant certiorari where the Petition for Writ of Certiorari does not allege a "special and important" reason for review

Even if Petitioner had raised the federal question in state court and had petitioned from a final judgment, the Petition for Writ of Certiorari does not state any "special and important reasons" for reviewing the decision of the North Carolina Court of Appeals as required by Rule 17 of the Supreme Court Rules. The constitutional issue is not one of general importance, and the state court has not decided the question in conflict with other deci-

sions of this Court, a federal court of appeals or another state court. The refusal to grant a new trial will not violate the Petitioner's due process rights. See Swenson v. Skidham, 409 U.S. 224 (1972); Ford Motor Co. v. N.L.R.B., 305 U.S. 64 (1938).

As this Court stated in Rice v. Sioux City Memorial Park Cemetary, Inc., 349 U.S. 70, 74 (1955):

> 'Special and important reasons' imply or reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard to the court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

In this case, the issues involved do not reach constitutional dimensions. Even if they did, this Court has a duty to avoid decision on the issues unless

there is a question of importance not heretofor decided.

The Petitioner does not allege that the decision of the North Carolina Court of Appeals is in conflict with any federal decision on the constitutional issue it raises for the first time in its Petition. The decision has no importance to any past or future decision of this Court or others. Petitioner only argues that the decision of the North Carolina Court of Appeals is in conflict with a recent North Carolina Supreme Court case, Farmer's Bank v. Michael T. Brown Distributors, Inc., 307 N.C. 342, 298 S.E.2d 357 (1983).

But apparently the state court of last resort, the North Carolina Supreme Court, felt there was no conflict and therefore denied discretionary review.

There was substantial evidence in the record to support the additional findings of fact and conclusions of law which the trial judge must make under the decision of the North Carolina Court of Appeals. The refusal to grant the new trial would not, in any way, deprive the Petitioner of an opportunity to be heard.

Petitioner cites Brinkerhoff-Faris Trust Sav. Co. v. Hill, 281 U.S. 673 (1930), in support of its contention that, by remanding for further proceedings without ordering a new trial, the North Carolina Court of Appeals has deprived Petitioner of its due process rights. Brinkerhoff-Faris Trust & Sav. v. Hill, id., is easily distinguished from the instant case. First, the plaintiff there explicitly and timely raised the constitutional issue in the petition

for rehearing before the Missouri Supreme Court, establishing thereby the Court's jurisdiction to review it on certiorari. Secondly, this Court held that the plaintiff had been deprived of due process because the state court refused to hear plaintiff's complaint when plaintiff did not first seek an administrative remedy. Here, the trial court heard the Petitioner's complaint, evidence and arguments at trial. Petitioner will have further opportunity to be heard on remand to the trial court.

In addition, certiorari in this case should be denied for other, practical reasons. If certiorari were granted, it would mean that any party could petition this Court for certiorari by alleging that it had raised the constitutional issue of due process deprivation by

implication or that said issue had been ruled upon by implication. Secondly, a party could petition this Court if his case were remanded for further proceedings without a new trial by claiming he was deprived of an opportunity to be heard without regard to whether he had had a full and fair hearing in the first instance.

III. The North Carolina Court of Appeals has not deprived Petitioner of its right to be heard, as guaranteed by the due process clause of the fourteenth amendment to the United States Constitution, when it remanded Petitioner's action to the trial court for further proceedings on the existing record instead of ordering a new trial

The Supreme Court of the United States has held that the due process requirement of an opportunity to be heard is satisfied when that opportunity is at a meaningful time and in a

meaningful manner. Mathews v. Eldridge, 424 U.S. 319 (1976). The right to that opportunity must, however, be kept within the limits of practicality. Boddie v. Connecticut, 401 U.S. 371 (1971).

In Mathews v. Eldridge, supra, the Court set out three major factors for determining whether a party received an adequate hearing. Those factors are the private interests of the parties, the government's interest, including practicality considerations, and the risk of erroneous deprivation of such interest through procedures used and the probable value of additional procedural safeguards.

The Petitioner contends that the Court of Appeals ruling, remanding the cause for further proceedings upon the

existing record, denied its opportunity to be heard by depriving it of a "full hearing". The Supreme Court has defined a full hearing as one in which ample opportunity is afforded to all parties to make by evidence and argument of a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. Akron C&Y Ry. Co. v. United States, 261 U.S. 184 (1923).

Petitioner has not, however, asserted how those rights have been deprived by the action of the North Carolina Court of Appeals. The judgment of the trial court was vacated because two necessary issues were not included in the findings and conclusions of the court. The Court of

Appeals found no questions raised on appeal as to the admission or exclusion of evidence or the credibility of witnesses. Both issues which were lacking in the findings and conclusions of the court, the alleged contractual relationship between the Petitioner and the Respondent and the third party beneficiary status of Petitioner in respect to Respondent's permanent loan commitment, were raised by the Petitioners in its original complaint. Therefore, at the original trial it had a full opportunity to present evidence and arguments as to these issues and did so. There is no contention by Petitioner that there is new evidence which has surfaced since the trial nor is there a contention that relevant evidence as to these matters was

excluded at the trial. Hence, it must be assumed that the existing record is adequate to support the additional conclusions of law in question.

There is no limitation preventing the Petitioner from making further arguments to the trial judge with respect to the issues remanded. The Petitioner had a reasonable opportunity to be heard as to the resolved issues from which no appeal was taken. Further, the Petitioner had ample opportunity to present at the trial evidence and arguments as to the issues on which the trial judge failed to rule and has additional opportunity for input on these.

Once the trial court has made specific findings as to the remanded issues, the Petitioner still has an

opportunity to challenge those rulings, and, if the Petitioner disagrees with the decision of the trial court on remand, it can appeal to the North Carolina Court of Appeals on the entire record and ask it to determine whether those issues were fairly resolved and whether the judgment was supported by adequate findings and conclusions.

The constitutional issue which Petitioner attempts to raise in its Petition is analogous to the criminal trial proceeding where a challenged confession is admitted to the jury before there has been a judicial finding of voluntariness with respect to that confession and a verdict is rendered against the defendant. This Court has held that a flaw in the trial proceeding of such nature does not

entitle the accused to a new trial, if subsequently the state provides the accused with an error free judicial determination of voluntariness. Swenson v. Stidham, 409 U.S. 224 (1972); See also Jackson v. Denno, 378 U.S. 368 (1964). Respondent respectfully submits that, if a new trial is not required in a criminal proceeding to protect the accused's due process rights, remand of this case to the trial court for further proceedings consistent with the Court of Appeals' decision would not violate the Petitioner's due process rights, where it has had and will have an opportunity to be heard.

Respondent's contentions in this regard are consistent with the holding of this Court that, on remand from an appeal from an administrative proceeding, where the appellate court deter-

mines that the findings of fact and conclusions of law were inadequate, if the findings which are lacking may be made properly upon the evidence already received, it is not required that evidence be reheard. Ford Motor Co. v. N.L.R.B., 305 U.S. 364 (1938).

## IV. The decision of the North Carolina Court of Appeals is not in conflict with either the statutory or the case law of the State of North Carolina

Petitioner contends that the decision of the North Carolina Court of Appeals conflicts with the decision of the North Carolina Supreme Court in Farmers Bank v. Michael T. Brown Distributors, Inc., supra. An examination of Farmers Bank will show that there is no conflict.

First, in both Farmers Bank and in Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982), cited by Petitioner, the Court of Appeals had affirmed the trial court's judgment. Here, the Court of Appeals did not affirm the judgment of the trial court, but instead entered an interlocutory determination reversing the trial court's judgment and remanding the cause to the trial court to make conclusions of law and findings of fact on each of the six issues specified in its decision based on the record. Thus, the North Carolina Court of Appeals has done here what the North Carolina Supreme Court did in both cases relied on by Petitioner, i.e. reversed and remanded to the trial

court for further proceedings consistent with its decision.

Secondly, the trial court's judgment in Farmers Bank v. Michael T. Brown Distributors, Inc., supra, contained a conclusion of law which the majority of the Supreme Court felt was not supported by either adequate findings of fact or sufficient evidence on which to base adequate findings of fact. Here, the Court of Appeals in its decision has held that the judgment of the trial court is deficient for failing to address certain issues before it and to make conclusions of law thereon and findings of fact in support thereof. The Court of Appeals has made no determination on the adequacy of the evidence to support such conclusions of law and findings of

fact as the trial court shall make on remand. The Petitioner has not alleged that it has new or additional evidence to introduce.

The only difference in the opinion of the Supreme Court in Farmers Bank v. Michael T. Brown Distributors, Inc., supra, and the decision of the Court of Appeals in the case at bar, if any exists, is the manner in which the trial court was to proceed on remand. In Farmers Bank, a hearing was ordered to take evidence on one of the principal issues of the case. In this case, there is no suggestion that the evidence is insufficient and the cause has been remanded for further proceedings upon the existing record consistent with the Court of Appeals' decision.

A new evidentiary hearing is not mandated in every case which is remanded for additional findings of fact. In Coble v. Coble, 300 N.C. 708, 268 S.E.2d 185 (1980), the North Carolina Supreme Court remanded because the findings of fact were insufficient to support the judgment but did not require a new hearing. Other cases have been remanded for more detailed findings of fact without requiring a new hearing. See Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967); Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967); Evans v. Craddock, 61 N.C.App. 438, 300 S.E.2d 908 (1983).

Chemical also relies upon Quick v. Quick, supra, and Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130

S.E.2d 311 (1963), as support for its contention that, if it is not entitled to a new trial, it is entitled to an evidentiary hearing on the six issues specified in the Court of Appeals decision. A rehearing was ordered in both cases because the Supreme Court was of the opinion that some of the facts of the case which were necessary to a determination of the rights and liabilities of the parties had not been fully developed at the trial. There has been no suggestion in this case that there are any facts which remain to be developed.

Chemical also contends that a new trial is needed to avoid tainting the new judgment of the trial court and cites Conrad v. Jones, 31 N.C.App. 75, 228 S.E.2d 618 (1976), in support thereof.

The basis for the Court of Appeals' holding in Conrad is easily distinguished from its decision in this case. There the Court of Appeals held that the judge had tried the case on an incorrect legal theory. The Court said:

> . . . [I]t appears that the trial judge believed that the court had no authority to grant equitable relief unless the plaintiffs offered evidence of irreparable injury. However, plaintiffs' claim is based upon 'continuing trespass' and equitable relief in the form of a permanent injunction is the proper remedy in such cases in order to avoid a multiplicity of actions at law for damages. (Citations omitted)

Id. at 78.

There is no indication that the trial court here either incorrectly framed the issues on which the trial was conducted or misunderstood the rules of law applicable to said issues,

only that the trial court had made insufficient conclusions of law and findings of fact in support thereof with regard to certain specified issues.

O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978), cited by Petitioner, is also distinguishable. There, the trial court had improperly excluded plaintiff's parol evidence which was relevant to whether there existed a condition precedent to liability on a guaranty and to what the intentions of the guarantor were at the time the guaranty was executed. The testimony excluded went to the heart of the gravamen, i.e. whether the guaranty on which the action was brought existed.

In this case, Petitioner has also objected to the admission of certain

evidence. The testimony complained of was not offered on the ultimate issue of the existence and legal effect of the documents but to provide details of the contract negotiations and intentions of the parties. Even if the evidence in question were determined to be inadmissible, there is sufficient other admissible evidence to which Petitioner has not objected to support each of Respondent's proposed findings of fact. Because of the interlocutory nature of the Court of Appeals' decision, it did not attempt to make a determination on the admissibility of the evidence in question.

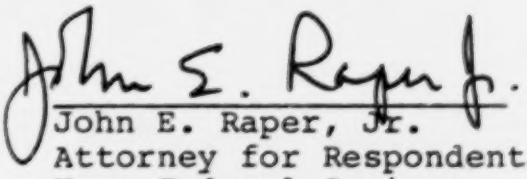
## CONCLUSION

The decision of the North Carolina Court of Appeals, from which Petitioner's petitions for rehearing and

for discretionary review have been unanimously denied, is plainly correct. The Petition for Writ of Certiorari is both premature and attempts to raise for the first time a constitutional issue which Respondent did not raise or argue in the state courts.

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted this 30th day of July, 1984.



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Appendix 1

No. Twenty-Eighth District

NORTH CAROLINA COURT OF APPEALS

* * * * * * * * * * * * * * * * * *

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|---|---|---|
| CHEMICAL REALTY CORPORATION | ) | FROM BUNCOMBE COUNTY |
| | ) | No. 76-CVS-2491 |
| v. | ) | |
| | ) | (8228 SC 1265) |
| HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF HOLLYWOOD | ) | |

* * * * * * * * * * * * * * * * * *

PLAINTIFF - APPELLANT'S PETITION UNDER APPELLATE RULE 31 FOR REHEARING OF JUDGMENT OF THE COURT OF APPEALS REMANDING THE CASE TO THE TRIAL COURT ON THE EXISTING RECORD RATHER THAN ORDERING A NEW TRIAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Chemical Realty Corporation, plaintiff-appellant, ("Chemical") respectfully petitions this Court for a rehearing of the judgment of this Court entered the 27th day of December, 1983,

remanding the case to the trial court on the existing record, upon the following grounds:

(1) The Court of Appeals erred in failing to order a new trial, and the appellate court decision should be modified accordingly.

(2) In the alternative, Chemical is entitled to a hearing at the trial level at which time evidence may be presented on the six issues which the Court of Appeals has ruled must be determined by the trial court.

I. THE JUDGMENT OF THE TRIAL COURT SHOULD BE VACATED AND A NEW TRIAL ORDERED.

The Court of Appeals has ruled that the case can be remanded to the trial court "on the existing record" without the necessity of a new trial. Slip op. at 13. However that ruling is

contrary to the holding of the North Carolina Supreme Court in Farmers Bank v. Michael T. Brown Distributors, Inc., 307 N. C. 342, 298, S. E. 2d 357 (1983).

In Farmers Bank, as in this action, the case was tried without a jury. In both cases the trial courts made certain findings of fact and conclusions of law on some of the issues in the cases but failed to make all the necessary findings arising under the pleadings and the evidence. The Supreme Court in Farmers Bank vacated the order of the trial court and ordered a new "hearing" so that the court could make adequate and appropriate findings of fact and conclusions of law. It is the contention of Chemical that a new "hearing" is synonymous with a new trial since

the trial court's decision in the Farmers Bank case was made as the result of an actual trial.

There are other North Carolina decisions which also support Chemical's argument for a new trial. See O'Grady v. First Union National Bank, 296 N. C. 212, 250 S. E. 2d 587 (1978); Baysdon v. Nationwide Mutual Fire Insurance Co., 259 N. C. 181, 130 S. E. 2d 311 (1963); Conrad v. Jones, 31 N. C. App. 75, 228 S. E. 2d 618 (1976).

The instant case is analogous to the Conrad case in which the plaintiffs sought a mandatory injunction ordering the defendants to disconnect a sewer line constructed by them from an eight inch line allegedly owned by one of the plaintiffs and a permanent injunction restraining the defendants from recon-

necting their sewer line to the plaintiff's sewer line. The action was tried without a jury, and the court made findings of fact and concluded that the plaintiffs were not entitled to equitable relief. On appeal by the plaintiffs, the Court of Appeals reversed the trial court, vacated the judgment and ordered a new trial because the trial court failed to make any findings with respect to what interest, if any, the plaintiffs had in the sewer line, and thus whether they were entitled to equitable relief. 31 N. C. App. at 79. As in Conrad, until the trial court determines the fundamental question of whether a contract exists between Chemical and Home Federal, the court cannot determine the other issues in the case which it has

already determined. Since the new judgment may be tainted by the old judgment, Chemical is entitled to a new trial.

This argument is strengthened further by Chemical's exceptions, assignment of error and arguments made in its appellate brief relating to the erroneous introduction of certain trial testimony. As explained in VI of Chemical's brief filed with the Court on February 1, 1983, the trial court erred by allowing various lay witnesses to testify as to the existence and legal effect of various contracts involved in the lawsuit. However, North Carolina law is clear that "a witness will not be allowed to give his opinion on the very question for the jury to decide" and "a non-expert may

not testify to the legal effect of a transaction or other fact." See H. Brandis, Brandis on North Carolina Evidence, §126 at 393; §130 at 501 (2d Rev. Ed. of Stansbury's North Carolina Evidence); in both The Bonnet-Brown Corporation v. Coble, 195 N. C. 491, 142 S. E. 772 (1928), and Richard v. Wilmington and Weldom Railroad Company, 126 N. C. 100, 35 S. E. 235 (1900), the Supreme Court ordered new trials because the trial court erred in allowing in non-expert opinion testimony.

Similarly, in O'Grady v. First Union National Bank, 296 N. C. 212, 250 S. E. 2d 587 (1978), the court ordered a new trial where the court in a non-jury case erred in making rulings on the admission of certain testimony.

Thus, as in those cases, a new trial should be ordered based on the trial court's erroneous evidentiary rulings.

In addition to the erroneous evidentiary rulings of the trial court, Chemical has also made exceptions and assignments of error relating to errors of law in the findings and conclusions relating to the issue of a first lien on the hotel real property. For example, conclusion of Law Number 4 states in part:

> On October 14, 1974, neither Landmark nor Chemical could deliver a permanent loan Deed of Trust evidencing a valid first lien on the hotel real property to secure a $6,000,000.00 loan evidenced by the first mortgage real estate note.

However, as explained in Chemical's appellate brief in part II-A-2, V-K and V-L-3, that conclusion is based on erroneous legal interpretations of the

court. Although the Court of Appeals did not reach that question, it goes to the heart of the case. In Rock v. Ballou, 286, N.C. 99, 209 S. E. 2d (1974), while the North Carolina Supreme Court refused to order a "complete new trial", in a case where findings of face were inadequate, it did so on the ground that "no error of law is shown in the findings of fact heretofore made." The errors of law in the present case pervade the judgment and should result in a new trial.

II. AT A MINIMUM, CHEMICAL IS ENTITLED TO A NEW HEARING AT WHICH IT MAY INTRODUCE ADDITIONAL EVIDENCE ON THE ISSUES TO BE DECIDED BY THE TRIAL COURT.

If Chemical is not entitled to a new trial on all of the issues in the case, it is clearly entitled to a hearing on the six issues which the

Court of Appeals has stated must be resolved by the trial court. See Slip op. at 12. In Quick v. Quick, 305 N. C. 446, 290 S. E. 2d (1982), the plaintiff sought permanent alimony and attorney's fees. The trial court, after hearing extensive testimony and receiving various documents into evidence, made findings of fact under Rule 52, but the Supreme Court found the court failed to make findings on certain material issues which would support the judgment for the plaintiff in the amount of $1275.00 per month as permanent alimony and $1000.00 in attorney's fees. The court stated:

> [T]here is evidence in the record from which findings of fact could be made to support the amount awarded. There is also ample evidence which would support a lower award. What the evidence does in fact show is a matter for the trial court's determination,

> and its determination should be stated in appropriate and adequate findings of fact.

305 N. C. at 457. The court held:

> For the reasons stated above, the decision of the Court of Appeals is reversed. The order awarding plaintiff permanent alimony and attorney's fees is vacated. A new hearing shall be held in the trial court for determination of permanent alimony and counsel fees, if any, and the trial court shall make appropriate and sufficent findings of fact and conclusions of law to support its new determination. (Emphasis added.)

Id., at 463.

In Rock v. Ballou, 286 N. C. 99, 209 S. E. 2d 476 (1974), a case in which the parties had waived jury trial and the Supreme Court of North Carolina remanded the case to the Superior Court for further findings of fact, the Supreme Court said:

> "The matter must be remanded to the Superior Court solely for findings as to the above mentioned

> questions of fact, which findings the Superior Court may make upon the present record, together with such further evidence as the Superior Court may deem necessary to enable it to make such findings, and thereupon to enter its judgment."

286 N. C. 105. The Superior Court should be given the same authority here.

Obviously, before the trial court in this action can make findings of fact and conclusions of law on the six issues remanded to it, the court must hold a hearing to receive evidence from both parties on those issues. An evidentiary hearing is required even though, as in Quick v. Quick and Rock v. Ballou, there is already evidence in the record on these issues.

## CONCLUSION

The opinion of the Court of Appeals should be modified to order a new

trial, or in the alternative, for an evidentiary hearing on the six issues to be decided by the trial court.

This 10th day of January, 1984.

PARKER, POE, THOMPSON,
BERNSTEIN, GAGE &
PRESTON

By: /s/ Sydnor Thompson
Sydnor Thompson

/s/ Sally Nan Barber
Sally Nan Barber

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Appendix 14

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Petition upon the defendant by depositing a copy in the United States mail, with adequate postage thereon to insure delivery, addressed to counsel of record, to wit:

Richard M. Wiggins
John E. Raper, Jr.
McCOY, WEAVER, WIGGINS,
CLEVELAND & RAPER
P. O. Box 7179
Fayetteville, North Carolina
28302

John S. Stevens
REDMOND, STEVENS, LOFTIN & CURRIE
29 North Market Street
P. O. Box 7146
Asheville, North Carolina 28807

This 10th day of January, 1984.

/s/ Sydnor Thompson
SYDNOR THOMPSON

NORTH CAROLINA

MECKLENBURG COUNTY

Appendix 15

C. Richard Rayburn, who for a period of more than five years, has been a member of the Bar of the State of North Carolina and who has no interest in the subject matter of Chemical Realty Corporation v. Home Federal Savings and Loan Association of Hollywood, No. 8228 SC 1265, in the Court of Appeals of North Carolina, and who has not been of counsel for Chemical Realty Corporation or Home Federal Savings and Loan Association of Hollywood in the action on appeal, hereby certifies he has carefully examined the appeal and the authorities cited in the decision, and that he considers the decision of the Court of Appeals in error on the point of its not having ordered a new trial or, in the alternative, authorized the taking of further evidence as the Superior Court may deem necessary to enable it to make proper findings, as a matter of law.

This 9th day of January, 1984.

/s/ C. Richard Rayburn
Attorney at Law

C. Richard Rayburn
2100 First Union Plaza
Charlotte, North
Carolina 28282

NORTH CAROLINA

MECKLENBURG COUNTY

Appendix 16

S. Dean Hamrick, who for a period a more than five years, has been a member of the bar of the State of North Carolina and who has no interest in the subject matter of Chemical Realty Corporation v. Home Federal Savings and Loan Association of Hollywood, No. 8228 SC 1265, in the Court of Appeals of North Carolina, and who has not been of counsel for Chemical Realty Corporation or Home Federal Savings and Loan Association of Hollywood in the action on appeal, hereby certifies he has carefully examined the appeal and the authorities cited in the decision, and that he considers the decision of the Court of Appeals in error on the point of its not having ordered a new trial or, in the alternative, authorized the taking of further evidence as the Superior Court may deem necessary to enable it to make proper findings, as a matter of alw.

This 10th day of January, 1984.

/s/ S. Dean Hamrick
Attorney at Law

S. Dean Hamrick, Esq.
1014 Law Building
Charlotte, North
Carolina 28202

Appendix 17

No. 8228-SC-1265 Twenty-Eighth District

SUPREME COURT OF NORTH CAROLINA

* * * * * * * * * * * * * * * * * * *

| | | |
|---|---|---|
| CHEMICAL REALTY CORPORATION | ) | FROM BUNCOMBE COUNTY |
| | ) | No. 76-CVS-2491 |
| v. | ) | |
| | ) | |
| HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF HOLLYWOOD | ) | |

* * * * * * * * * * * * * * * * * * *

PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. §7A-31

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA

Chemical Realty Corporation, plaintiff-appellant, ("Chemical") respectfully petitions the Supreme Court of North Carolina that the Court certify for discretionary review the judgment of the North Carolina Court of Appeals filed December 6, 1983, certi-

fication date December 27, 1983, in No. 8228SC1265, a copy of which is attached hereto, for the following reasons:

(1) The decision of the Court of Appeals, remanding the case to the trial court on the existing record, appears likely to be in conflict with North Carolina law as set forth in Farmers Bank v. Michael T. Brown Distributors, Inc., 307 N.C. 342, 298 S.E.2d 357 (1983), in which the Supreme Court ordered a new hearing for the trial court to make sufficient findings of fact and conclusions of law in a non-jury case.

(2) The subject matter of the appeal has significant public interest.

(3) The case involves legal principles of major significance to the jurisprudence of the State of North Carolina.

Appendix 19

In support of this petition, Chemical shows the following:

FACTS

Chemical filed this action in the Buncombe County Superior Court on December 20, 1976 and seeks to recover $5,694,951.56 in money damages for, inter alia, the defendant's breach of a permanent loan commitment for the Landmark Hotel (now Inn on the Plaza) in Asheville, North Carolina. This case was tried before the Honorable C. Walter Allen, sitting without a jury, in Buncombe County Superior Court from September 22, 1980 through and including October 9, 1980. Closing arguments in the case were deferred pending the preparation of the trial transcript by the court reporter. Pursuant to Judge Allen's instructions, both parties

filed proposed findings of fact, conclusions of law and judgment on November 2, 1981, and Home Federal was allowed to file a substitute proposed judgment on November 17, 1981. Judge Allen heard closing arguments in the case on November 23, 1981. Pursuant to Rule 52 of the North Carolina Rules of Civil Procedure, Judge Allen made certain findings of fact and conclusions of law and entered judgment for the defendant on June 29, 1982, and Chemical gave notice of appeal on July 7, 1982. On December 3, 1982 the Record on Appeal in this case was docketed with the North Carolina Court of Appeals.

On December 6, 1983, the Court of Appeals filed its decision in this matter, and the case was certified to Buncombe County on December 27, 1983.

The Court of Appeals reversed the judgment of the trial court, and remanded the case to the trial court on the existing record "for further proceedings consistent with this opinion" on the ground that the trial court failed to make certain essential findings of fact and conclusions of law. Slip op. at 13.

On January 11, 1984, Chemical filed a petition under Appellate Rule 31 for rehearing of the judgment of the Court of Appeals, seeking to obtain a new trial. By order entered February 7, 1984, the Court of Appeals denied Chemical's petition for rehearing and certified the order to the Clerk of Superior Court in Buncombe County, North Carolina. Chemical petitions the Supreme Court for discretionary review

under N.C.G.S. §7A-31 and Rule 15 of the North Carolina Rules of Appellate Procedure.

REASONS WHY CERTIFICATION SHOULD ISSUE

I.

The Court of Appeals has reversed the judgment of the trial court and ruled that the case can be remanded to the trial court "on the existing record" without the necessity of a new trial. Slip op. at 13. Chemical does not contest that part of the appellate court's opinion which reverses the judgment of the trial court. However, the ruling of the Court of Appeals remanding the case on the existing record without a new trial is contrary to the holding of the North Carolina Supreme Court in Farmers Bank v. Michael T. Brown Distributors, Inc., 307 N.C. 342, 298 S.E.2d 357 (1983).

In Farmers Bank, as in this action, the case was tried without a jury. In both cases the trial courts made certain findings of fact and conclusions of law on some of the issues in the cases but failed to make necessary findings arising under the pleadings and the evidence. The Supreme Court in Farmers Bank vacated the order of the trial court and ordered a new hearing so that the court could make adequate and appropriate findings of fact and conclusions of law. The Supreme Court noted that there was a conflict in the evidence as to the intention of the parties concerning the terms of a guaranty agreement. Thus, a question of fact existed for the court, as the trier of fact, to decide. However, the court failed to make any findings as to

the intent of the parties. The Supreme Court stated:

> We hold, therefore, that the findings of fact in the trial court's order are insufficient, for the reasons discussed in this opinion, to support the conclusions of law made. For the trial court to fully comply with the principles discussed in this opinion, its order must be vacated and a new hearing held so that it can make adequate and appropriate findings of fact and conclusions of law. (Emphasis added.)

307 N.C. at 353. The majority rejected the suggestion of the dissent that the case "be remanded for additional findings of fact." Id., at 356.

It is the contention of Chemical that the Court of Appeals should have ordered a new trial in this case as the Court did in the Farmers Bank case. As in Farmers Bank, the trial court failed, among other things, to make any findings of fact as to the intentions of Chemical,

Home Federal, Landmark or others with respect to significant issues, such as the management contract for the hotel. The decision of the Court of Appeals clearly conflicts with the majority decision in Farmers Bank.

There are other North Carolina decisions which also support Chemical's argument for a new trial. See O'Grady v. First Union National Bank, 296 N.C. 212, 250 S.E.2d 587 (1978); Baysdon v. Nationwide Mutual Fire Insurance Co., 259 N.C. 181, 130 S.E.2d 311 (1963); Conrad v. Jones, 31 N.C.App. 75, 228 S.E.2d 618 (1976).

The instant case is analogous to the Conrad case in which the plaintiffs sought a mandatory injunction ordering the defendants to disconnect a sewer line constructed by them from an eight

inch line allegedly owned by one of the plaintiffs and a permanent injunction restraining the defendants from reconnecting their sewer line to the plaintiff's sewer line. The action was tried without a jury, and the court made findings of fact and concluded that the plaintiffs were not entitled to equitable relief. On appeal by the plaintiffs, the Court of Appeals reversed the trial court, vacated the judgment and ordered a new trial because the trial court failed to make any findings with respect to what interest, if any, the plaintiffs had in the sewer line, and thus whether they were entitled to equitable relief. 31 N.C.App. at 79. As in Conrad, until the trial court determines the fundamental question of whether a contract

exists between Chemical and Home Federal, the court cannot determine the other issues in the case which it has already determined. Since the new judgment may be tainted by the old judgment, Chemical is entitled to a new trial.

Chemical's position that a new trial should have been granted is strengthened further by Chemical's exceptions, assignments of error and arguments made in its appellate brief relating to the erroneous introduction of certain trial testimony. The Court of Appeals erroneously states in its decision that "we perceive there are no questions raised in the appeal as to the admission of evidence or credibility of witnesses ...." Slip op. at 13. Chemical did raise these issues on

appeal, but the Court of Appeals apparently overlooked them. As explained in Part VI of Chemical's brief filed with the Court of Appeals on February 1, 1983, the trial court erred by allowing various lay witnesses to testify as to the existence and legal effect of various contracts involved in the lawsuit. However, North Carolina law is clear that "a witness will not be allowed to give his opinion on the very question for the jury to decide" and "a non-expert may not testify to the legal effect of a transaction or other fact." See H. Brandis, Brandis on North Carolina Evidence, §126 at 393; §130 at 501 (2d Rev. Ed. of Stansbury's North Carolina Evidence); see also, The Bonnett-Brown Corporation v. Coble, 195 N.C. 491, 142 S.E. 772 (1928), and

Richard v. Wilmington and Weldom Railroad Company, 126 N.C. 100, 35 S.E. 235 (1900), in which the Supreme Court ordered new trials because the trial court erred in allowing non-expert opinion testimony.

It is not enough to say that the trial court should be deemed to have disregarded the inadmissible evidence. Since there was no admissible evidence on which the trial court could have reached the result contained in the judgment, it is clear that the inadmissible evidence did affect the decision.

Moreover, in O'Grady v. First Union National Bank, 296 N.C. 212, 250 S.E.2d 587 (1978), the court ordered a new trial where the court in a non-jury case erred in making rulings on the admission of certain testimony. Here

to a new trial should be ordered based on the trial court's erroneous evidentiary rulings.

In addition to the erroneous evidentiary rulings of the trial court, Chemical also made exceptions and assignments of error relating to errors of law in the findings and conclusions relating to the issue of a first lien on the hotel real property. For example, conclusion of Law Number 4 states in part:

> On October 14, 1974, neither Landmark nor Chemical could deliver a permanent loan Deed of Trust evidencing a valid first lien on the hotel real property to secure a $6,000,000.00 loan evidenced by the first mortgage real estate note.

As explained in Chemical's appellate brief in parts II-A-2, V-K and V-L-3, that conclusion is based on erroneous legal interpretations of the trial

court. Although the Court of Appeals did not reach that question, it goes to the heart of the case. In Rock v. Ballou, 286 N.C. 99, 209 S.E.2d (1974), while the North Carolina Supreme Court refused to order a "complete new trial", in a case where findings of fact were inadequate, it did so on the ground that "no error of law is shown in the findings of fact heretofore made." The errors of law in the present case pervade the judgment and should result in a new trial.

II.

If Chemical is not entitled to a new trial on all of the issues in the case, it is clearly entitled to an evidentiary hearing on the six issues which the Court of Appeals has stated must be resolved by the trial court.

See Slip op. at 12. In Quick v. Quick, 305 N.C. 446, 290 S.E.2d (1982), the plaintiff sought permanent alimony and attorney's fees. The trial-court, after hearing extensive testimony and receiving various documents into evidence, made findings of fact under Rule 52, but the Supreme Court found the court failed to make findings on certain material issues which would support the judgment for the plaintiff in the amount of $1275.00 per month as permanent alimony and $1000.00 in attorney's fees. The court stated:

> [T]here is evidence in the record from which findings of fact could be made to support the amount awarded. There is also ample evidence which would support a lower award. What the evidence does in fact show is a matter for the trial court's determination, and its determination should be stated in appropriate and adequate findings of fact.

305 N.C. at 457. The court held:

> For the reasons stated above, the decision of the Court of Appeals is reversed. The order awarding plaintiff permanent alimony and attorney's fees is vacated. A new hearing shall be held in the trial Court for determination of permanent alimony and counsel fees, if any, and the trial court shall make appropriate and sufficient fundings of fact and conclusions of law to support its new determination. (Emphasis added.)

Id., at 463.

In Rock v. Ballou, 286 N.C. 99, 105, 209 S.E.2d 476 (1974), a case in which the parties had waived jury trial and the Supreme Court of North Carolina remanded the case to the Superior Court for further fundings of fact, the Supreme Court said:

> "The matter must be remanded to the Superior Court solely for findings as to the above mentioned questions of fact, which findings the Superior Court may made upon the present record, together with

> such further evidence as the Superior Court may deem necessary to enable it to make such findings, and thereupon to enter its judgment." (Emphasis added)

The Superior Court should be given the same authority here.

The decision of the Court of Appeals is contrary to the law of North Carolina as enunciated by the Supreme Court. If the decision of the Court of Appeals is permitted to stand, it will be in direct conflict with the decisions of the North Carolina Supreme Court discussed herein.

In addition, the subject matter of this appeal has significant public interest and involves legal principles of major significance to the jurisprudence of the State of North Carolina in that it involves the breach of a take-out agreement by a permanent lender to

a construction lender for commericial real estate. As far as Chemical has been able to determine, this case presents issues which have not been decided by the courts in North Carolina and which are very important in commercial lending.

WHEREFORE, for the reasons set forth above, Chemical respectfully requests that the North Carolina Supreme Court issue an order certifying this cause for review.

Respectfully submitted this 21st day of February, 1984.

/s/ Sydnor Thompson
Sydnor Thompson

/s/ Sally Nan Barber
Sally Nan Barber

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Appendix 36

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# APPENDIX

## LIST OF PARENT CORPORATION, AFFILIATED CORPORATIONS AND SUBSIDIARY CORPORATIONS PURSUANT TO RULE 28.1

Home Federal Savings and Loan Association of Hollywood changed its name to Home Savings Association of Florida and converted from a federally chartered to a state chartered savings and loan association on June 2, 1980.

Parent Corporation: None

Affiliated Corporations: None

Wholly Owned Subsidiary Corporation:

American Home Service Corporation

## CERTIFICATE OF SERVICE

This is to certify that in accordance with Rule 28 of the Rules of the Supreme Court, I have on this day served the required three (3) copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari to the North Carolina Court of Appeals by depositing same in a United States mail box with First-Class postage prepaid and addressed to the following attorneys for Petitioner:

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This 1st day of August, 1984.

John E. Raper, Jr.
JOHN E. RAPER, JR.